Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum	)	
Enhancement Act and Modernization of the	)	WT Docket No. 05-211
Commission's Competitive bidding Rules and	)	
Procedures	)	
	)	
	)	

FURTHER NOTICE OF PROPOSED RULEMAKING

COMMENTS OF CENTENNIAL COMMUNICATIONS CORP.

This proceeding results from a proposal by Council Tree Communications ("Council Tree")[1] that would bar the award of bidding credits or other small business benefits, available under the Commission's general competitive bidding rules,[2] to entities that have a "material relationship" with a "large in-region incumbent wireless service provider." By further notice dated January 27, 2006, the Commission seeks comment on several proposals arising from Council Tree's letter that would modify the Commission's bid-

[1] The proposal is outlined in a letter from Council Tree Communications to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 (June 13, 2005)

[2] *See* 47 C.F.R. 1.2101 *et seq.*

ding rules governing benefits reserved for designated entities.[3] Pursuant to the Commission's further notice of proposed rulemaking ("FNPRM"), Centennial Communications Corp. ("Centennial")[4] offers the following comments that generally support Council Tree's proposals.

1. Background.

There is little doubt that auctions provide an efficient means for assigning spectrum licenses. Anyone long enough in the tooth to remember the endless tractations of the cellular comparative hearings will attest to this observation. Congress, however, had long refused, on a bipartisan basis, to give the Commission auction authorization.[5] In the early 1990s, the pressure to increase federal revenues, the manifest deficiencies of the cellular lotteries with their huge windfalls to lucky players, and the willingness of a Democratic administration to seek auction authority from a Democratic-controlled Congress resulted in legislation granting the FCC the power to auction spectrum licenses.[6] In giving the Commission auction authority, however, Congress was solicitous of the arguments made by small businesses, minorities,

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[3] For the Commission's purposes, designated entities amount to small businesses. *See* Amendment of Part 1 of the Commission's Rules – Competitive bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking,* 15 FCC Rcd 15293 ¶ 48 (2000).

[4] Centennial is a regional wireless provider that, through several of its subsidiary companies, holds CMRS licenses in rural and small town areas of six states as well as in Puerto Rico and the Virgin Islands.

[5] There have been a variety of explanations for Congress's refusal. *See, e.g.* Kwerel and Rosston, "An Insider's View of the FCC Spectrum Auctions," Stanford Institute For Economic Policy Research (Publication No. 98-2, February 1999). http://siepr.stanford.edu/papers/pdf/98-2.pdf. The authors cite a number of explanations for the refusal.

[6] Omnibus budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002, 107 Stat. 312, 387-392 (1993)("OBRA").

and women that they would be disadvantaged in an auction for spectrum. Accordingly, Congress placed language in the act directing the FCC "to ensure the participation of designated entities in the provision of service."[7] As envisioned by Congress, auctions should have several objectives, among which was

> [P]romoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women[8]

Even as Congress exhorted the FCC to make provisions for "businesses owned by members of minority groups and women," a case questioning the constitutionality of such preferences was moving toward the Supreme Court. The Court's decision in that case produced a last minute change in the Commission's rules for a key auction of spectrum. The case, *Adarand Constructors, Inc. v. Pena*,[9] held that strict scrutiny governs whether race-based classifications violate the equal protection component of the Fifth Amendment's Due Process Clause. In light of this ruling, the FCC, which had earlier established rules for minority and women-owned business to receive bidding preferences in the soon-to-be held personal communications services ("PCS") auc-

[7] OBRA Section 309(j).
[8] OBRA Section 309(j)(3)(C)
[9] 515 U.S. 200 (1995)

tions, changed its rules to limit the bidding preferences to small businesses only.[10]

Although the original intent of Congress to provide explicit support of minority and women-owned businesses in the spectrum auctions (as well as to small businesses and rural telephone companies) was made difficult, if not impossible, to fulfill in the light of *Adarand,* the essential policy concern of Congress – concentration of licenses – remained as the key congressional policy concern. The House Report[11] on the legislation, for example, expressed the view that disseminating licenses among small businesses would prevent a significant increase in the concentration of the telecommunications industries.[12] This concern remains a viable one and Centennial urges the Commission to keep it in mind as it reviews the response to this FNPRM.

2. <u>The Commission Should Adopt Its Tentative Proposal.</u>

As noted above, the FCC created the designated entity program to fulfill Congress's direction to avoid a concentration of licenses by ensuring the ability of small businesses to participate in the competitive bidding for spectrum licenses. There is today significant concentration of spectrum rights among the top five national wireless carriers. These carriers, Cingular, Verizon Wireless, Sprint, T-Mobile, and ALLTEL, currently control more than

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[10] *In re* Implementation of Section 309(j) of the Communications Act-Competitive Bidding, *Sixth Report and Order*, 11 F.C.C.R.. 136, 47 (1995) ("*Sixth Report and Order*").
[11] H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378 [hereinafter *House Report*].
[12] *House Report* at 254.

90% of the CMRS spectrum[13] as a percentage of MHz POPs of spectrum. Indeed, in the most recent PCS auction, Auction 58, these carriers acquired 71% of the licenses they won there through designated entity partnerships.[14] By contrast, in the 2000 reauction of certain PCS spectrum blocks, Auction 35, Verizon Wireless, Sprint, Cingular and AT&T Wireless acquired 39% of their licenses there through designated entity partnerships with the remainder – 61% - won directly.

The designated entity program now risks becoming simply a means for the very large carriers to bid for spectrum rights through proxies possessing bidding preferences. For example, the forthcoming Advanced Wireless Services ("AWS") auction contains no objective spectrum aggregation limits. With the CMRS spectrum cap itself having expired January 1, 2003,[15] CMRS license transfers are subject to no rubric of concentration other than Commission review to determine if they are in the public interest.[16] Without corrective action, then, the increasingly dominant and influential position of the large carriers in designated entity bidding will continue to grow and result in ever greater concentration. In Centennial's view, reserving the designated entity benefits for those that have no material relationship with a national

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[13] This figure is derived using data from Kagan Research – Wireless Atlas and Databook 2005.

[14] These figures are based upon an examination of the auction results and the bidders' disclosures as found on the FCC's auction website, http://wireless.fcc.gov/auctions/default.htm?job=auctions_home.

[15] *In the Matter of 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services,* WT Docket No. 01-14 (December 18, 2001) at ¶1.

[16] *Id* at ¶ 54 *et seq.*

wireless service provider will combat the growing concentration in industry ownership. At the same time, prohibiting those transactions will create more opportunities for new entrants and smaller carriers.

3. The Commission's Rule Should Apply To National Wireless Service Providers.

The FNRPM proposes that a national wireless service provider should be defined as one having average gross wireless revenues for the preceding three years that are equal to or greater than $5 billion.[17] This $5 billion threshold is viewed as an objective measure by which to address carriers that, collectively, have more than 90% of the spectrum, 91% of the service revenues,[18] and 89% of the industry's subscribers.[19]

While avoiding an increasing concentration of licenses is an important public policy, it is not the only policy that led Congress to direct the FCC to establish bidding preferences. Congress saw the dissemination of licenses to a wide variety of businesses, including small businesses, as an important public policy, too.[20] In this regard, Centennial believes that small businesses would enjoy greater access to spectrum licenses if the average gross wireless revenues test were set at $1 billion for the three preceding years. Use of this test will encourage existing smaller carriers to consider working with designated entities in fashioning solutions for the regional and rural markets that

[17] ¶¶ 17, 19.
[18] Based upon CTIA's Semi-Annual Wireless Industry Survey for June 2005.
[19] *Id.*
[20] *See* fn 8, *supra.*

tend to lag behind the large urban markets in the deployment of advanced technologies.

For the same reason, Centennial believes that designated entities' access to spectrum would be enhanced if the revenue test were to apply to entities with significant interests in communications services as well.[21] The failure of the "C" and "F" blocks in the original PCS auction has been ascribed to a mix of causes: the set-aside of the blocks, the installment payment plans, and the association of some designated entities with well heeled businesses, which emboldened some of the bidders to push prices beyond what was paid in the A and B band auctions.[22] The Commission's auction rules no longer provide for set-asides or for installment payments, two of the elements contributing to the sad history of the "entrepreneurs' blocks." The rules should also account for the third element by applying the revenue test to entities with significant interests in communications services.

Additionally, there is no good reason why a large entity with significant interests in communications services should have the option of bidding for spectrum through a proxy when national wireless service providers cannot. Large firms of this sort, whether they are carriers of one sort or another, content providers, or equipment manufacturers should be presumed to seek entry into the wireless market through their association with designated en-

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[21] FNRPM at ¶ 19.

[22] *See,* Kwerel and Rosston, fn. 5, *supra. See also,* Munson, "A Legacy of Lost Opportunity: Designated Entities and the Federal Communications Commission's Broadband PCS Spectrum Auction," 7 *Mich. Telecomm. L. Rev.* 217 (2000).

tities. The congressional direction to the FCC regarding small business opportunities in spectrum auctions was not meant to provide these large, well financed newcomers with a discount in the acquisition of spectrum. From Centennial's viewpoint, no good reason appears to permit them access to the benefits reserved for small businesses.

4. <u>The Commission's Rule Should Apply Where The Service Area Licensed To The Designated Entity Overlaps With The Service Area Licensed To The National Wireless Service Provider.</u>

Centennial supports the proposal that the Commission define a

> "[L]arge, in-region, incumbent wireless service provider" as an entity (including all parties under common control) that is, or has an attributable interest in, a CMRS or AWS licensee whose licensed service area has significant overlap in the geographic area to be licensed to the designated entity applicant.[23]

To determine if the overlap is significant or not, the Commission should employ the standard of Section 20.6(c) of the Commission's rules.[24] In the same manner, the Commission's "attributable interest" standards should also be employed.[25] Centennial judges it unwise to permit a national wireless carrier to divest itself of a potentially disqualifying overlap so that the designated entity may retain its bidding credit. Since it is unlikely that such would carrier would make the divestiture *before* auction, there seems little reason to

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[23] FNPRM at ¶ 18.
[24] 47 C.F.R. §20.6(c). As noted above, this provision "sunset" in January 2003. However, the standards that section of the Commission's rules used to determine significant geographic overlap may be employed here to good effect.
[25] 47 C.F.R. § 20.6(d). Like Section 20.6(c), this section has also expired under the sunset provisions of Section 20.6(f).

permit it to game the system by divesting *after* the auction when it can compare the merits of what it has won with what it holds already.

5. **The Commission's Rule Should Apply When A National Wireless Service Provider Has Any Material Financial Or Operating Arrangement With A Designated Entity.**

A material financial arrangement should be viewed as any arrangement that, directly or indirectly, provides the designated entity with a portion of its total capitalization that can reasonably be expected to confer upon either a national wireless carrier or a large entity with significant communications services an ability to exercise *de facto* control of the designated entity's operations. Evidence of the this control would be any operating agreements, roaming arrangements, branding, trade marking, joint marketing, or leasing relationships negotiated at less than arm's length or containing provisions other than what is common in the industry.

CONCLUSION

For the foregoing reasons, Centennial Communications Corp. respectfully urges the Commission to adopt a rule that will preserve for designated entities the opportunity to participate in the provision of spectrum-based services. This goal is best attained, in Centennial's view, by the Commission's adoption of its tentative proposal outlined in the FNPRM by which the Commission would modify its rules "to restrict the award of the designated entity benefits" in situations where a designated entity has a material relationship with a large, in-region, incumbent wireless carrier. Centennial also urges the Commission to extend the restriction to designated entities having a material relationship with entities with significant interests in communications services.

Respectfully submitted,

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